97-901

No. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM 1997

DAVID L. MCLELAND,

Petitioner,

v.

SYNCOR INTERNATIONAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

Whether the Courts below properly construed an arbitration agreement and ordered enforcement of an arbitrator's decision which was rendered ex parte, after notice to petitioner?

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OPINIONS BELOW

On March 29, 1995, the United States District Court for the Southern District of West Virginia granted the Motion of Syncor International Corporation ("Syncor") to Enforce the Final Award of Arbitrator, David V. Breen. Petitioner David L. McLeland ("McLeland") filed a Motion for a New Trial which the District Court denied on August 19, 1996. McLeland appealed to the Fourth Circuit Court of Appeals, and the Fourth Circuit affirmed the District Court's Order.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on August 11, 1997. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), 2101(c).

STATEMENT OF THE CASE

A. Basis of Jurisdiction In the First Instance and Procedural History

This case arises out of dispute between David L. McLeland ("McLeland") and his employer, Syncor International Corporation ("Syncor"). On May 18, 1995, Syncor submitted an arbitration demand to the American Arbitration Association ("AAA"), in accordance with the terms of an Arbitration Agreement voluntarily entered into by McLeland with Syncor. On July 12, 1995, the AAA scheduled the arbitration to take place in Charleston, West Virginia on August 21, 1995, and duly notified both parties. Respondent's Appendix A; Petitioner's Appendix D at D-7; Petitioner's Appendix M at M-11; Respondent's Appendix B at B-7.

Upon the advice of his first attorney and the theory that the dispute was not arbitrable, McLeland decided not to appear at the arbitration. Petitioner's Appendix E at E-4; Respondent's Appendix B at B-3 through B-4. Invoking the Federal

Arbitration Act, 9 U.S.C. 1, et seq., Syncor filed a Complaint and Petition to Compel Arbitration on August 2, 1995 seeking a hearing within five (5) days. When the District Court was unable to hear Syncor's Petition before August 21, 1995, the arbitration proceeded *ex parte* as provided for in the AAA rules which specifically governed the Arbitration Agreement. McLeland's answer to the original Complaint was filed two days later, on August 23.

The arbitrator issued his lengthy written Arbitrator's Final Award Including Factual Findings and the Reason on Which the Decision is Based on September 29, 1995. He found that McLeland had violated several agreements entered into with Syncor and awarded Syncor damages including, among other things, 100% of the stock in Princeton Diagnostic Isotopes, Inc. ("PDI"). Petitioner's Appendix M at M-1 through M-18. On October 17, 1995, Syncor filed in the case before the District Court a Motion to Enforce Arbitrator's Final Award.

On March 12, 1996, the District Court conducted a hearing on the Motion, and McLeland testified. On March 29, 1996, the District Court entered an Order granting Syncor's Motion to Enforce the Arbitrator's Award.

McLeland then terminated his relationship with his original lawyer and retained his present counsel. On April 8, 1996, McLeland moved for a new trial and to set aside Syncor's judgment. On April 25, 1996, Syncor filed a response. Meanwhile, on April 15, 1996, Jeffrey Clanton, McLeland's alleged partner, filed a motion to join him as an indispensable party. On May 2, 1996, Syncor filed its response to Mr. Clanton's motion. On August 19, 1996, the District Court entered an Order denying both motions and upholding its previous Order enforcing the Arbitrator's Award.

On September 13, 1996, McLeland appealed the District Court's decision to the United States Circuit Court of Appeals for the Fourth Circuit. Arguments were held on June 4, 1997,

and on August 11, 1997 the Fourth Circuit affirmed the District Court's order in an unpublished *per curiam* opinion.

STATEMENT OF THE FACTS

McLeland was employed with Syncor in various positions for more than ten (10) years. By 1994, he had advanced to the position of regional pharmacy manager of between five and ten Syncor pharmacies that generated annual revenue of between ten and twenty-five million dollars. Respondent's Appendix B at B-4 through B-6. During the course of his employment, McLeland executed various employment agreements with Syncor. The agreement which is the primary subject of this appeal is a 1995 Arbitration Agreement (the "Arbitration Agreement") in which McLeland and Syncor agreed to binding arbitration, according to AAA rules, of disputes arising out of separation from employment. Petitioner's Appendix O at O-1 through O-2. McLeland voluntarily entered into the Arbitration Agreement, and had no

concerns or misgivings about entering into it. Respondent's Appendix B at B-9 through B-10.

Other agreements between Syncor and McLeland included a 1993 Employment Agreement (the "Employment Agreement"). Petitioner's Appendix K at K-1 through K-4 and Petitioner's Appendix L at L-1 through L-5. McLeland also signed similar 1990 and 1995 Invention, Secrecy and Other Matters Agreements (the "Secrecy Agreement"). Petitioner's Appendix Q at Q-1 through Q-6 . The Employment Agreement prohibited McLeland from, among other things (i) enticing other employees to leave Syncor and (ii) competing against Syncor for a period of ninety (90) days following the termination of his employment. Petitioner's Exhibit K at K-1. The Employment Agreement also created an irrevocable Consulting Agreement Option during the term of the agreement and for 90 days thereafter, and also provided for injunctive relief and attorney's fees as remedies for any dispute

thereunder. Petitioner's Appendix K at K-3 through K-4; Petitioner's Appendix L at L-1 through L-5. McLeland admitted in open court that he voluntarily agreed to the restrictive covenant against competition and to the provisions regarding injunctive relief. Respondent's Appendix B at B-9 through B-10. The Secrecy Agreement contained similar provisions, and specifically prohibited McLeland from directly or indirectly using propriety information to solicit, divert or otherwise attempt to take away any of Syncor's customers. Petitioner's Appendix Q.

In a letter dated November 28, 1994, Syncor informed McLeland that, for business reasons, it was necessary for Syncor to eliminate his position effective December 31, 1994. Respondent's Appendix C. Pursuant to company policy, McLeland received 10 weeks severance pay. Respondent's Appendix C. McLeland also received an additional 12 weeks of severance pay in exchange for signing an Agreement and

Release, releasing Syncor from any claims arising from his separation of employment. Respondent's Appendix C; Petitioner's Appendix R at R-1 through R-2. On January 5, 1995, McLeland was rehired by Syncor as a temporary pharmacist. Petitioner's Appendix Q at Q-1 through Q-6. At that time, he voluntarily signed the Arbitration Agreement. In March of 1995, his employment as a temporary pharmacist was terminated. Respondent's Appendix D.

Sometime in October or November 1994, on the eve of the coming termination, McLeland began planning and pursuing establishing a nuclear pharmacy in the Beckley/Princeton area which he hoped to operate as a joint venture with Syncor. Petitioner's Appendix M at M-4 through M-5. In November, 1994, Syncor rejected McLeland's idea. Petitioner's Appendix M at M-8 through M-9. Although McLeland was aware of Syncor's disapproval, he convinced Wade Hopkins, another Syncor employee, to help him establish

the pharmacy, and Hopkins paid McLeland $20,000.00 for 50% of its stock. Respondent's Appendix E; Petitioner's Appendix M at M-4 through M-5. In violation of the Secrecy Agreement and Employment Agreement, McLeland incorporated the pharmacy as Princeton Diagnostic Isotopes, Inc. on January 31, 1995. Petitioner's Appendix M at M-4 through M-5.

Without appropriate approval from Syncor, McLeland also began soliciting Syncor's customers including two (2) key customers located in Raleigh County, West Virginia -- Raleigh General Hospital and Beckley Hospital. Petitioner's Appendix M at M-5. At that time, the Beckley Hospital contract was worth approximately $10,000 per month and the Raleigh General Hospital contract was worth approximately $23,000 per month. Petitioner's Appendix M at M-5. These customers represented about 45% of the business of Syncor's Huntington, West Virginia pharmacy. Petitioner's Appendix M at M-5.

In January or February 1995, after McLeland's plans for establishing a joint venture with Syncor had failed, Syncor became aware of these efforts to establish a competing pharmacy. Petitioner's Appendix M at M-11. In February 1995, Mr. Haig Bagerdjian, Syncor's general counsel, contacted McLeland regarding his activities. Petitioner's Appendix M at M-11. McLeland immediately attempted to negotiate a deal with Syncor to sell all or part of PDI to Syncor. Petitioner's Appendix M at M-11. Despite Syncor's efforts to resolve this matter, the parties could not come to terms. Petitioner's Appendix M at M-11.

On March 30, 1995, after these negotiations failed, Syncor wrote McLeland to notify him that it intended to exercise its option under the 1993 Employment Agreement, to engage him as a consultant. McLeland refused to sign the consulting agreement, and this dispute began in earnest, as set forth in the procedural history in Section A, above.

Meanwhile, Syncor purchased Hopkins' 50% interest in PDI. Petitioner's Appendix M at M-11. However, McLeland refused to transfer the stock certificates, claiming that the stock was subject to a buy-sell agreement in favor of McLeland. Petitioner's Appendix M at M-11. Hopkins never entered into any such buy-sell agreement. Petitioner's Appendix M at M-11.

On August 21, 1995, as set forth in the procedural history above, Syncor arbitrated this matter *ex parte*. The arbitrator found that McLeland's activities violated the 1993 Employment Agreement and the 1995 Secrecy Agreement. Petitioner's Appendix M at M-18. Pursuant to those agreements, the arbitrator awarded Syncor 100% of the stock in PDI, ordered McLeland to cease and desist from soliciting or selling to Syncor's customers, and ordered McLeland to cease and desist from further violating the Agreements. Petitioner's Appendix M at M-11; Petitioner's Appendix N at N-1 through

N-3. It is this award, as enforced by both Courts below, which McLeland seeks to avoid.

REASONS FOR DENYING THE PETITION

I. The Petition raises no new legal issues and conflicts with the strong, clear federal policy favoring arbitration.

This Court has directed federal courts to "rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985). The heavy presumption favoring arbitration is based on the need for speedy and efficient decisions. Peoples Sec. Life Ins. v. Monumental Life Ins. Co., 867 F.2d 809 (4th Cir. (Md.) 1989). Arbitration cases tend by their nature, to be fact-specific and to turn on the specific language of the arbitration agreement at issue. This case fits this model. Accordingly, nothing in this case presents the sort of novel or critical legal issue which would warrant granting the Petition.

Syncor obtained the arbitrator's detailed decision in its favor on September 29, 1995. Petitioner's Appendix M at M-1 through M-8. That should have been the final word. McLeland voluntarily entered into the Arbitration Agreement, and Syncor had every reason to expect that arbitration would resolve its dispute with McLeland. The result, however, has been unnecessary, unwarranted and seemingly unending litigation. By trying time and time again to avoid his legal obligations, McLeland has spurned the federal policy favoring arbitration.

These efforts to change the outcome of an arbitration are disfavored: "Parties may not seek a 'second bite at the apple' simply because they desire a different outcome. 'To permit such attempt would transform a binding process into a purely advisory one.'" Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. (N.C.) 1994), *citing* Richmond, Fredericksburg and Potomac R. Co. v. Transportation Communications Int'l Union 1992, 973 F.2d 276 (4th Cir. (Va.) 1992). In the spirit

of the strong and clear federal policy favoring arbitration and for the other reasons set forth below, the Supreme Court should deny McLeland's petition.

II. The *ex parte* Arbitration was Proper and McLeland has Offered No Valid Basis for Overturning the Award.

The Arbitration Agreement is governed explicitly by the AAA rules. As both the District Court and the Fourth Circuit concluded, the AAA "rules provide for an arbitration hearing to proceed *ex parte* if a party who has received proper notice does not participate in the hearing." Memorandum Opinion; Petitioner's Appendix B at B-5; Appellate Opinion; Petitioner's Appendix A at A-6.

McLeland claims that the *ex parte* arbitration was improper because, in his view, the AAA rules require joint selection of the arbitrator. Since McLeland did not participate in the selection of the arbitrator, he contends that the arbitration proceeded in violation of the AAA rules. He further asserts that

the Fourth Circuit's ruling in this case conflicts with the Fifth and Ninth Circuits regarding the issue of arbitration enforcement when the arbitrator was not selected in accordance with the Arbitration Agreement. Petitioner's argument is flawed both legally and factually. First, the Fourth, Fifth and Ninth Circuits are not in conflict over this issue. Second, contrary to Petitioner's assertion, the Arbitrator in this case was selected in accordance with AAA rules.

A. This Case Presents No Conflict of Any Issue Among the Circuit Courts.

McLeland asserts that the Fourth Circuit's holding in this case and in Sheet Metal Workers International Association Local Union v. Power City Plumbing & Heating, Inc., 934 F.2d 557 (4th Cir. (N.D.W.Va.) 1991), that "if the opposing party was served with proper notice and was aware of the arbitration proceedings, '[t]he arbitration award is valid and fully enforceable despite [that party's] absence,'" conflicts with decisions rendered by the Fifth Circuit and Ninth Circuit.

Specifically, McLeland claims that this holding is contrary to the Ninth Circuit's holding in Toyota of Berkeley v. Automobile Salesman's Union, Local 1095, 834 F.2d 751 (9th Cir. (N.D.Calf.) 1987). Toyota of Berkeley and the Automobile Salesman's Union were parties to the collective bargaining agreement. The Union submitted a grievance to Toyota after Toyota discharged an automobile salesman. Several months later the Union submitted a formal demand for arbitration. The parties agreed on an arbitrator and an arbitration was scheduled, but Toyota decided it would not participate in the arbitration because it claimed the Union failed to comply with procedural requirements. The Court in Toyota of Berkeley, construing the agreement in that case, stated:

> If an agreement provides that the parties shall jointly select an arbitrator, however, the Court **may** refuse to enforce an award made following an *ex parte* hearing before an arbitrator selected without the defaulting party's cooperation on the grounds that the party not in default should have sued to compel arbitration.

Id. at 754 [emphasis added]. Since the parties had agreed on an arbitrator before the arbitration, the Ninth Circuit's statement was merely dicta, and the arbitration agreement in that case differed from the one at issue in this Petition. Nevertheless, the Ninth Circuit did not require a court to refuse to enforce an award when join selection is mandated, but not followed. Rather, the Ninth Circuit gave the court discretion to enforce such an award. Thus, Toyota of Berkeley does not conflict with the Fourth Circuit's decision in Power City and the present case.

Likewise, Power City and the present case do not conflict with the Fifth Circuit's decision in Sam Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128 (5th Cir. (S.D.Tex.) 1973) *cert. denied*, 414 U.S. 1001 (1973). Although the facts in Sam Kane are different from the present case, the holding again supports enforcement of Syncor's arbitration award.

Sam Kane involved a collective bargaining agreement that allowed each party to nominate a representative with the representative of each party jointly selecting a third arbitrator. The collective bargaining agreement provided that if one party did not participate in the arbitration, the representative appointed by the single party would arbitrate the grievance and his decision would bind both parties. The Fifth Circuit held that this clause would be construed strictly to apply only where a party failed to name a representative to the arbitration board. Hence, this clause did not apply because Sam Kane Packing Company named an arbitrator who refused to participate on the grounds that the case was not arbitrable. The *ex parte* arbitration failed to comply with the collective bargaining agreement, and thus was not enforceable.

In this case, Syncor proceeded to arbitrate this matter in full compliance with its Arbitration Agreement. The collective bargaining agreement in Sam Kane contained requirements that

were not present in the arbitration agreements in the present case, in Power City, or Toyota of Berkeley. Thus, Sam Kane does not conflict with the Fourth or Ninth Circuit decisions.

In fact, the Fifth Circuit's ruling actually supports the district court's enforcement of the arbitration award in this case. In Sam Kane, the Fifth Circuit "note[d] that had there been a method whereby an admittedly 'neutral' arbitrator was selected and the company merely refused to participate in the hearing we would be faced with a strong case for the award." 477 F2d. at 1136. Contrary to McLeland's assertions, as discussed below, a neutral arbitrator was selected by the AAA, in accordance with its rules, in the present case. Thus, the Fifth Circuit's dicta in Sam Kane is in accordance with the Fourth Circuit's rulings in Power City and the present case.

B. The Arbitrator was Neutral, and was Selected Solely by AAA with No Input from Syncor.

McLeland attempts to paint a picture of unfairness on the basis that he failed to participate in the selection of the arbitrator. Furthermore, he claims that joint selection of the arbitrator is required by the AAA rules. McLeland's argument is factually flawed. First, as the District Court and Fourth Circuit concluded, the AAA rules merely provide for "joint input" and do not require joint selection. Secondly, and perhaps more importantly, the arbitrator was selected completely by the AAA with no input from Syncor.

The AAA Rules provide for the AAA to send each party, simultaneously, a list of arbitrators for the parties to review and make their objections and strikes, if any. These rules were followed On May 23, 1995, AAA mailed each party a list of proposed arbitrators and allowed each party to strike three names from the list. AAA further allowed the parties to

list all remaining names in the order of preference on a form provided by AAA. Syncor did not strike any names, and did not list the arbitrators in any preferential order. Rather, Syncor responded that it had no preference. See, Respondent's Appendix F.

McLeland had his chance to participate in selecting an arbitrator, but declined. So, the AAA proceeded to select the arbitrator and schedule the arbitration. McLeland never expressed any concern with the selection process in his Answer (filed two days after the arbitration hearing) or in any District Court brief. Nor did he testify regarding such concerns during the hearing on Syncor's Motion to Enforce the Arbitrator's Award. In fact, he never filed a brief with the arbitrator; and never raised any objection to the selection process until he appealed to the Fourth Circuit. If he had, the record would be clearer.

McLeland complains about being deprived of his strikes, but he has never made any claim that the arbitrator was biased, and he has never objected to the choice of the arbitrator. By his own admission, he was not prejudiced by his failure to participate in the selection of the arbitrator. As the Fourth Circuit found, the AAA rules provide only for joint input, not joint selection. Since the AAA rules also recognize the validity of an *ex parte* arbitration, the Fourth Circuit properly concluded that the selection of the arbitrator and the arbitration proceeding itself were both valid despite McLeland's failure to participate.

III. The Lower Courts Properly Decided that the Matter was Arbitrable, and the Timing of that Decision in this Case is Irrelevant.

The District Court thoroughly analyzed the issue of arbitrability, using the language of the Arbitration Agreement, the Court found that the dispute was related "to the separation of respondent from his employment with Syncor" (Petitioner Appendix B at B-8); and concluded that the case was arbitrable. The Fourth Circuit upheld that decision, and no basis exists for revisiting it.

McLeland also claims, however, that the arbitration should not have proceeded without an order from the Court on the issue of arbitrability before the arbitration took place. As a matter of law and policy, this claim should be rejected. The issue of arbitrability, in every arbitration, is a distinct issue which courts wills always review; the purposes of arbitration would be foiled in this case if arbitrability had to be decided, by a court, before arbitration commenced.

Cases cited by McLeland actually contradict his assertion. In First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1921 (1995), the Supreme Court held that if the parties agreed to submit the question of arbitrability to the arbitrator, "then the court should defer to the arbitrator's arbitrability decision. If not, then the court should decide the question independently." Because the issue is independent, it can be decided either before or after the arbitration itself. In First Options, this Court seemed to anticipate that the arbitration could take place ***before*** the court determines the issue of arbitrability, to enable the reviewing court to "defer to the arbitrator's arbitrability decision."

Likewise, in Toyota of Berkeley, the Court decided the issue of arbitrability ***after*** the arbitration occurred. Thus, although arbitrability is a question for the court, it is implicit in Toyota of Berkeley's decision that a court may resolve the issue ***after*** the arbitration.

Allowing courts to rule on arbitrability after a matter is arbitrated is also in accordance with the strong federal policy favoring arbitration. See AT&T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415, 475 U.S. 643 (1986) (doubts concerning arbitrability should be resolved in favor of arbitration). Based on the policy favoring arbitration, courts have placed the burden of proving a matter is not arbitrable on the party contesting arbitrability. See generally, Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332, 482 U.S. 220 (1987); Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. (W.D.N.C.) 1990); Aronson v. Dean Witter Reynolds, Inc., 675 F.Supp. 1324 (S.D.Fla. 1987).

The burden was on McLeland to prove that the matter was not arbitrable. Tut nothing in the Arbitration Agreement supports his argument that arbitrability had to be decided by a court before the arbitration could begin. Since McLeland did

not even attempt to meet that burden prior to the arbitration, which he could have done by replying promptly to the original complaint filed by Syncor (See District Court Order, footnote 2, Petitioner's Appendix B at B-6, 7) the facts of this case and the federal policy supporting arbitration support the district court's resolution of the arbitrability issue after the arbitration.

CONCLUSION

The Court should deny McLeland's petition. The petition presents no conflict among the Circuits. Moreover, the District Court properly determined that the case was arbitrable, and properly enforced the arbitration award.

Respectfully submitted,

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